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11 UNITED STATES DISTRICT COURT  
12  
13 NORTHERN DISTRICT OF CALIFORNIA  
14  
15 SAN FRANCISCO DIVISION

16 UNITED STATES OF AMERICA,

17 Case No. CR-13-00722-WHO

18 Plaintiff,

19  
20 SENTENCING MEMORANDUM

21 v.

22 JOHN CLIFFORD POLLARD,  
23 Defendant.

24 Date: May 29, 2014  
Time: 1:30 p.m.

25 A. Charges and Conviction

26 On November 14, 2013, a one count information was filed charging the Defendant, John Pollard,  
27 with a violation of 26 U.S.C. § 7206(2) – Assisting in the Preparation and Presentation of a false  
Employer's Quarterly Federal Tax Return. On November 14, 2013, Defendant pled guilty to Count  
One. Sentencing is scheduled for May 29, 2014 at 1:30 p.m.

28 B. Sentencing Recommendations

The plea agreement and PSR agree that the base offense level is 16 and the adjusted offense level  
is 13. The Guideline provides a 12-18 month range for a level 13. .

The PSR recommends a sentence of 3 months custody (variance), 1 year supervised release with  
6 months home confinement, no probation, no fine, and restitution of \$173,463.

The United States recommends a sentence of 9 months custody, 1 year supervised release with 3

1 months home confinement, no probation, a fine of \$3,000, and restitution of \$173,463.

2 C. Summary of Government's Recommendation

3 Defendant owned and operated several construction companies from 2002 to 2010. Currently,  
 4 he continues to operate 512 Construction, Inc. doing business as SF Garage, which is the business  
 5 involved in the charged conduct. Defendant caused false Employer's Quarterly Federal Tax Returns  
 6 [Forms 941] to be filed with the IRS in 2009. These returns were false because they did not report cash  
 7 and payroll checks from three bank accounts. Defendant caused his bookkeeper to enter wages from  
 8 only one bank account to the payroll company to be reported on the Forms 941 while failing to report  
 9 \$430,430.17 in cash and wages paid from three other bank accounts. (PSR ¶ 10, 11). This resulted in  
 10 unpaid tax of \$173,463. (PSR ¶ 12) Through cooperation between the Defendant and the civil IRS, the  
 11 parties signed a civil closing agreement resolving the Defendant's civil tax liability relating to these  
 12 unreported wages. The civil closing agreement includes the tax of \$173,463 and the associated penalty  
 13 and interest on that tax, totaling \$306,854. (PSR ¶ 12)

14 Defendant admittedly ran his business to stay afloat. He accomplished this by using the  
 15 government's employment taxes. Defendant also had access to significant funds through kiting, which  
 16 included cashing fake employee paychecks at a check cashing business to cover NSF checks on an  
 17 almost daily basis. (PSR ¶ 10). There were two instances when his kiting amounted to check fraud.  
 18 PSR ¶ 8. In addition to the IRS and banks, the Defendant also misused an employee's credit card for  
 19 business expenses. That credit card still has an unpaid balance of \$18,000. (PSR ¶ 10).

20 While Defendant demonstrates his remorsefulness by hiring a respectable tax attorney in order to  
 21 run his business in compliance with the tax laws, as well as admitting his associated civil tax liability,  
 22 Defendant's criminal conduct and the manner in which he ran his business should also be considered.  
 23 Some of this conduct, such as check kiting and using fake employee paychecks to operate his business,  
 24 are not part of the substantive charge in this case. However, the government urges the Court to consider  
 25 this conduct as it pertains to the manner in which he ran his business. See U.S.S.G. 1B1.3.

26 The United States does not suggest that the Court ignore that the Defendant is accepting his  
 27 responsibility by making an effort to comply with the tax laws. However, there needs to be a just  
 28 punishment appropriate for the crime with consideration for Defendant's efforts, a deterrent message to

1 the public that tax crimes are treated seriously, and uniformity of sentencing considering similarly  
 2 situated defendants. The United States submits that its sentencing recommendation adequately  
 3 addresses these goals.

4 D. Standard for Sentencing

5 In United States v. Carty, 520 F.3d 984 (9th Cir. 2008), the Ninth Circuit summarized the  
 6 framework for sentencing as follows: The overarching statutory charge for a district court is to impose a  
 7 sentence sufficient, but not greater than necessary to reflect the seriousness of the offense, promote  
 8 respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public;  
 9 and to provide the defendant with needed educational or vocational training, medical care, or other  
 10 corrective treatment. Id. at 991(citing 18 U.S.C. § 3553(a) and (a)(2)).

11 All sentencing proceedings are to begin by determining the applicable Guidelines range. The  
 12 range must be calculated correctly. In this sense, the Guidelines are the starting point and the initial  
 13 benchmark, and are to be kept in mind throughout the process. Id. at 991(citing Gall v. United States,  
 14 128 S.Ct. 586, 596 (2007) and Kimbrough v. United States, 128 S.Ct. 558, 574 (2007)).

15 The parties and the PSR all agree that the base offense level is a level 16 and, with a 3 point  
 16 adjustment for acceptance of responsibility, the total offense level is 13.

17 18 U.S.C. § 3553(a)

18 The district court should then consider the 3553(a) factors to decide if they support the sentence  
 19 suggested by the parties, i.e., it should consider the nature and circumstances of the offense and the  
 20 history and characteristics of the defendant; the need for the sentence imposed; the kinds of sentences  
 21 available; the kinds of sentence and sentencing range established in the Guidelines; any pertinent policy  
 22 statement issued by the Sentencing Commission; the need to avoid unwarranted sentence disparities  
 23 among defendants with similar records who have been found guilty of similar conduct; and the need to  
 24 provide restitution to any victims. Id. at 991 (citing 18 U.S.C. § 3553(a)(1)-(7); Gall, 128 S.Ct. at 596-  
 25 97 n. 6)

26 In light of the congressional command that the court shall impose a sentence that is sufficient to  
 27 comply with the[se] purposes, the court must impose a sentence that promotes respect for the law,  
 28 achieves just punishment and which afford[s] adequate deterrence to criminal conduct. In this case,  
 there is a compelling need for a sentence that includes a term of incarceration at the Bureau of Prisons

1 for 9 months and 3 months home confinement.

2 Such a sentence is sufficient, but not greater than necessary, and accounts for (1) the seriousness  
 3 of the offense, (2) provides adequate deterrence, (3) avoids sentencing disparities, and (4) is consistent  
 4 with the Guidelines. A sentence of less than 6 months, or any deviation from the Guidelines, is not  
 5 warranted. The most critical factors here avoiding sentencing disparities and adequate deterrence.

6 1. The Defendant's Misconduct Was Serious

7 The conduct in this case is serious because it is a disturbingly familiar case of a wealthy  
 8 defendant manipulating a system to gain more money.

9 2. General Deterrence - Respect For the law

10 The need for deterrence in this case is tantamount. A non-custodial term cannot achieve that  
 11 purpose. General deterrence is one of the prescribed goals of every sentencing, United States v. Pugh,  
 12 515 F.3d 1179, 1194 (11th Cir. 2008), but it occupies an especially important role in sentencing for  
 13 criminal tax offenses, because criminal tax prosecutions are relatively rare:

14 The criminal tax laws are designed to protect the public interest in preserving the integrity of  
 15 the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote  
 16 respect for the tax laws. Because of the limited number of criminal tax prosecutions relative  
 17 to the estimated incidence of such violations, deterring others from violating the tax laws is a  
 primary consideration underlying these guidelines. Recognition that the sentence for a  
 criminal tax case will be commensurate with the gravity of the offense should act as a  
 deterrent to would-be violators.

18 U.S.S.G. ch 2, pt. T, introductory cmt. (emphasis added). See also United States v. Burgos, 276 F.3d  
 19 1284, 1290 (11th Cir. 2001) (observing "[f]or a judge sentencing a defendant convicted of tax evasion,  
 20 the chief concern may be general deterrence").

21 Our tax system is based on the honesty of each taxpayer in filing their tax returns. Most citizens  
 22 are honest taxpayers. The IRS is simply unable to verify the honesty of every tax return filed by  
 23 individuals, businesses, estates, etc. In fact, there are very few tax prosecutions compared to the  
 24 number of tax returns filed. To uphold the integrity of our system of taxation, the United States relies  
 25 heavily on the deterrent effect of each and every criminal case.

26 In this case, a 3 month prison term, or a non-custodial sentence, would fail to achieve deterrence  
 27 and respect for the law. In fact, it would send a message that you can gamble with the tax laws and the  
 28 price is low when you get caught. A purely probationary term would send a message that the

1 punishment for criminal tax evasion and a civil tax case are of no significant difference. For these  
 2 reasons, and for the reasons discussed below, the Court should impose a 9 month custodial sentence, and  
 3 3 months home confinement as a condition of supervised release. It is a sentence within the guidelines,  
 4 it recognizes Defendant's efforts to change and follow the law, and it promotes respect for the law in the  
 5 event that the Defendant or others choose to ignore the law in the future.

6 A sentence of no 3 months imprisonment, or probation, does not promote deterrence. Instead it  
 7 fosters a belief that tax crimes are not serious, that they are inconsequential. Such a sentence cries out  
 8 that this Court tolerates lies to government agencies. It also promotes the cynical belief that justice  
 9 system punishes only the poor, but gives a pass to others. And finally it promotes gambling with tax  
 10 returns. A game of chance with high rewards. A game of chance with little or no risk, in which the only  
 11 consequence to losers is to pay the civil tax debt.

12 The importance of imprisonment in tax cases was highlighted in United States v. Ture, where the  
 13 Eighth Circuit vacated a non-prison sentence in a \$250,000 tax evasion case because the district court  
 14 failed to consider the importance of a term of imprisonment to deter others from stealing from the  
 15 national purse. 450 F.3d 352, 358 (8th Cir. 2006). The admonition of the Court of Appeals in Ture  
 16 applies: the goal of deterrence rings hollow if a prison sentence is not imposed in this case. Id.

17 Along those lines, there is a public perception in cases like this of wealthy, white collar  
 18 defendants finally being charged, and getting away with light sentences or probation. A sentence of  
 19 imprisonment is proper, and should be imposed to end that belief.

20 This case is not different in any way that warrants a departure from the Guidelines.

21 3. A Nine Month Custodial Term Will Avoid Sentencing Disparity

22 Title 18, U.S.C. § 3553(a)(6), provides that one of the factors to be considered in sentencing is  
 23 the need to avoid unwarranted sentence disparity among defendants with similar records who have been  
 24 found guilty of similar conduct. When the sentencing guidelines were promulgated, the goals included  
 25 reducing the sentencing disparity between tax offenders and reducing the number of probationary  
 26 sentences. In this vein, the United States submits that this Court should consider two similar sentences.

27 In US v. Brendan McGrath, CR 11-00158-JSW (N.D. Calif.), McGrath ran a construction  
 28 business and failed to report his gross receipts on his tax returns. The tax loss was between \$5,000 and

1 \$12,500, corresponding to a level 10. McGrath was sentenced to 4 months imprisonment. Similarly,  
 2 McGrath agreed and signed a civil closing agreement which he fully paid prior to his sentencing.

3       US v. Brian Kenny, CR 13-00495-WHA (N.D. Calif.) involved the filing of false Employer's  
 4 Quarterly Federal Tax Returns for Kenny's construction company. The offense level was calculated at  
 5 level 13. Kenny also signed a civil closing agreement and paid the full amount of his restitution, in the  
 6 amount of \$199,493.83, prior to sentencing. Kenny was sentenced to 6 months imprisonment and 1 year  
 7 Supervised Release with 6 months home confinement. Kenny's plea was pursuant to Rule 11(c)(1)C of  
 8 the Federal Rules of Criminal Procedure, however, his counsel argued at sentencing for a probationary  
 9 sentence.

10       There are slight differences between these cases, none of which justify a sentence lower than 9  
 11 months imprisonment and 3 months home confinement as a condition of supervised release. There is no  
 12 need to avoid unwarranted sentence disparities among these three defendants with similar records who  
 13 have been found guilty of similar conduct.

14 E.     Restitution

15       Restitution in the amount of \$173,463 is due to the IRS in this case. The IRS can collect civil  
 16 penalty and interest first, then the tax. In this manner, the restitution is significant in the event that the  
 17 Defendant decides not to pay the tax and the government can collect on the restitution. Should the  
 18 Defendant fully pay his civil tax liabilities, the restitution would be fully paid.

19 F.     Fine

20       Although the Guidelines provide for a fine in the range of \$3,000 to \$30,000, the PSR  
 21 recommends no fine based on Defendant's ability to pay. The United States respectfully disagrees with  
 22 this assessment and urges the Court to impose a \$3,000 fine. The Defendant provides financial support  
 23 to both his elderly parents, and pays for his brothers' educational expenses. PSR ¶ 39. However,  
 24 Defendant's generosity toward his family members should not take precedence over his ability to pay a  
 25 fine. Defendant's ability to financially assist his family while failing to pay an \$18,000 debt for his  
 26 unauthorized charges on his employee's credit card is simply wrong. PSR § 10. Defendant should pay  
 27 a fine.

1 G. Criminal History Category

2 The PSR calculated Defendant's Criminal History Category as I. The United States is in  
3 agreement.

4 H. Conclusion

5 The United States submits that the tax loss results in adjusted offense level 13. Based on a CHC  
6 I, the guideline range is 12 - 18 months. The United States recommends a sentence of 12 months, to be  
7 served 9 months incarceration, 1 year supervised release with 3 months home confinement, restitution of  
8 \$173,463, a fine of \$3,000, and a special assessment of \$100. Such a sentence is reasonable given the  
9 tax loss and consideration of the § 3553 factors. That sentence takes into account the seriousness of this  
10 offense and deters any future misconduct of the defendant and others.

11 Respectfully submitted,

12 MELINDA HAAG  
United States Attorney

13 /s/ Cynthia Stier  
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14 Tax Division  
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